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# **New Hampshire 2014-15 Land Use Law in Review**

## ***Statutes and Cases***

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**Spring Planning & Zoning Conference**

Concord, NH

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# Today's Roadmap

- I. Finding the Law
- II. Recent NH Statutory Changes
- III. Recent NH Supreme Court Decisions

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# **PART I**

## **Finding the Law**

# Finding the Law

## NH Statutes and Bills

- Revised Statutes Annotated (RSA)
  - [www.gencourt.state.nh.us/rsa/html/indexes/default.html](http://www.gencourt.state.nh.us/rsa/html/indexes/default.html)
- Search for Bills
  - [http://www.gencourt.state.nh.us/bill\\_status/](http://www.gencourt.state.nh.us/bill_status/)

## NH Supreme Court Decisions

- [www.courts.state.nh.us/supreme/opinions/index.htm](http://www.courts.state.nh.us/supreme/opinions/index.htm)

## For Other Jurisdictions

- Cornell Law School
  - [www.law.cornell.edu/](http://www.law.cornell.edu/)
- Google Scholar
  - <http://scholar.google.com>

**Join Plan-link Nation!** Confer with over 700 of your best friends

- [www.nh.gov/oep/programs/MRPA/PlanLink.htm](http://www.nh.gov/oep/programs/MRPA/PlanLink.htm)



# Legislative Tracking

- Legislature's website
  - [http://www.gencourt.state.nh.us/bill\\_Status/](http://www.gencourt.state.nh.us/bill_Status/)
- Local Government Center (NHMA) Bulletins
  - [www.nhlgc.org](http://www.nhlgc.org)
- New Hampshire Planners Association (NHPA)
  - [www.nhplanners.org](http://www.nhplanners.org)

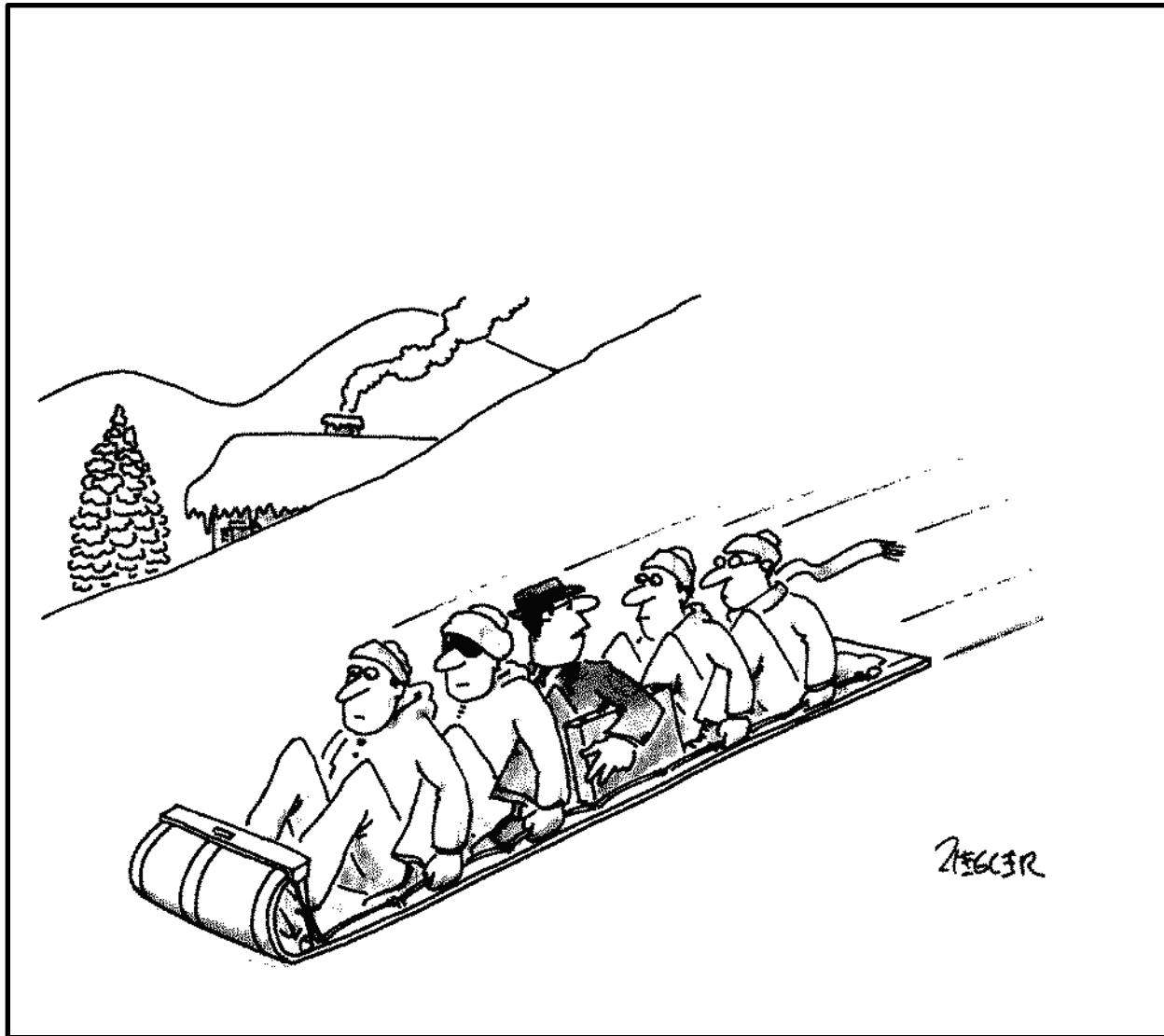
**New Hampshire Planners Association      2015 Legislative Session      As of 4/17/2015**

Bill No. Sponsor	Title	Position	HOUSE			SENATE			Chapter
			Comm. Status	Comm. Action	Floor Action	Comm. Status	Comm. Action	Floor Action	
HOUSE BILLS									
<a href="#">HB1</a> <a href="#">HB2</a> Kurk	HB1: making appropriations for the expenses of certain departments of the state for fiscal years ending June 30, 2016 and June 30, 2017  HB2: relative to state fees, funds, revenues, and expenditures	Watch / amend OEP sections	Finance Hg 3/5/15 Hg 3/9/15 ES 3/23/15 ES 3/24/15	OTPA for 4/1/15	Passed w/amend 4/1/15	Finance Hg 5/5/15 3:00-5; 6:00-8 Reps' Hall			
<a href="#">HB102</a> Belanger	Relative to consideration of warrant articles	Watch	M&CG Hg 1/20/15	OTP (18-0) CC	Passed 2/4/15	P&MA Hg 3/25/15			
<a href="#">HB108</a> Horrigan	Relative to the content and sealing of minutes in nonpublic sessions under the right-to-know law	Watch	Judiciary Hg 1/15/15 ES 2/4/15 ES 3/2/15	OTPA (17-0) for 3/11/15 CC	Passed w/amend 3/11/15	Judiciary Hg 4/21/15 9:00 100 SH			

## Other Sources

- *Land Use, Planning and Zoning*. Peter Loughlin, Esq. New Hampshire Practice Series, vol. 15. LexisNexis. Updated annually
- NHMA's "Town and City," online searchable index and full-text articles
- ***Don't forget to talk with your municipal attorney.*** That's the person who will be defending you in court! ...and who can help keep you out of court in the first place.

*"An ounce of prevention..."*



***“Look, I’m not saying it’s going to be today.  
But someday—someday—you guys will be  
happy that you’ve taken along a lawyer.”***

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# **PART II**

## **Recent NH Statutory Changes**

# Local Vesting & DES Permits

## 2012 Ch. 148 (SB241)

(OK, not so recent...)

- RSA 485-A:17, II-d Alteration of Terrain Permits
  - Permits are good for 5 years, and shall be extended for up to 5 additional years, provided...(a – f) and
  - (g) No previous extensions, “unless the subdivision plat or site plan associated with the permit has been deemed substantially complete by the governing municipal planning board in accordance with RSA 674:39, II”
  
- **Practice Point:** It’s important to understand how the vesting statute (RSA 674:39) works and what the planning board’s role is – don’t be passive!

# Road Standards

## 2014 Ch. 125 (HB 1371)

- RSA 236:13, V; RSA 674:35, I; RSA 674:42
  - Allows local legislative body to transfer authority to create road construction standards from the planning board to the local governing body
    - “...the extent to which and the manner in which streets within subdivisions shall be graded and improved...”
  - Effective August 15, 2014

# Notification of Zoning Changes

## 2014 Ch. 161 (HB 1210 (originally SB 228))

### ■ RSA 675:7, I

- ❑ Any property owner may request notice of all public hearings on zoning changes – electronic or First Class Mail at no cost to the owner
- ❑ Zoning boundary changes *affecting* 100 or fewer properties
  - Required hearing notice to all affected owners (this is relatively easy to figure out)
- ❑ Changes to minimum lot size or permitted uses in a district that *includes* 100 or fewer properties
  - Required hearing notice to all owners in district
  - *Lot size* is easy; understanding *permitted uses* is a bit tougher

### ■ RSA 675:7, II

- ❑ Notices shall be in “easily understood language...calculated to improve public understanding of the proposal”

10 ■ See: <https://nhmunicipal.org/TownAndCity/Article/587>

# Attorney General's Subdivision Approvals 2014 Ch. 291 (SB 387)

- RSA 356-A Land Sales Full Disclosure Act
  - Attorney General reviews and approves large subdivisions as part of its consumer protection mission; does the developer have the capacity to make the improvements as promised to purchasers?
  - Exemptions broadened for registration and annual reporting
    - Up to 50 lots
    - Zoning standards for single family homes or duplexes
    - In a municipality of at least 5,000 people, if it has
      - Planning board
      - Building code and building inspector
      - Zoning ordinance
      - Subdivision regulations
  - **What does it mean?** Less rigorous review by AG of exempted projects; pay attention to financial surety for improvements



# C-PACE

## 2014 Ch. 294 (HB 532)

- RSA 53-D “Property Assessed Clean Energy Districts”
  - Enables municipalities to lend money to property owners to undertake energy efficiency and renewable energy improvements
  - Repayment made as part of the property tax bill
  - Secured by a lien on the property
    - How the lien is treated in foreclosure has been a source of conflict since the law was adopted several years ago
  - Requires PACE liens to have prior mortgage holder’s permission to be able to survive foreclosure
  - Limits PACE to commercial (“C”) & industrial properties (includes 5+ multifamily properties)

# C-PACE Redux

## 2015 HB 205 (Pending)

- RSA 53-D “Property Assessed Clean Energy Districts”
  - ❑ Eliminates municipal financing option, leaving only private financing; municipal role in collecting special assessments remains (plus an admin fee to cover costs)
  - ❑ Passed by both the House and the Senate
  - ❑ If interested, check out <http://jordaninstitute.org/c-pace.html>
  - ❑ Webinar on C-PACE to be held on May 13 from noon to 1pm: [www.nhenergy.org/upcoming-les-trainings.html](http://www.nhenergy.org/upcoming-les-trainings.html)

# Building Permits and Private Covenants

## 2015 HB 286 (Pending)

### ■ RSA 674:51

- ❑ Bill would allow municipalities to authorize the building inspector to require compliance with private deed restrictions and covenants relative to structures subject to a building permit
- ❑ Passed by the House; Senate committee has recommended killing it (Senate will vote on 5/7/15)
- ❑ **Practice Point:** While this may be well-intentioned, be very, very careful about adopting this provision, if it's enacted. Private deed restrictions are called "private" for a reason: they're agreements between two private parties that don't involve the municipality. Why would you want to get in the middle of that?

# Mining Permits

## 2015 HB 451 (Pending)

### ■ RSA 12-E

- Mining activity that is exempt from DES permitting shall be subject to local ordinances, including site plan review
- Exempt: site of 5 acres or less and less than 2,000 cubic yards excavated annually
- Passed by the House; Senate committee hearing on 5/6/15

# Local Stormwater Ordinances

## 2015 SB 97 (Pending)

- RSA 149-I:6, I-a

- Authorization to adopt local stormwater ordinances. This is not a land use ordinance *per se*, but deals mainly with stormwater utilities and structures (could have land use implications)
- Passed by the Senate

and

- RSA 674:1, II (planning board) & RSA 674:33, I (ZBA)

- *In addition to the above*, planning board enabled to advise local governing body on stormwater ordinance's compliance with master plan, and ZBA enabled to advise on compliance with zoning ordinance
- Passed by the House; Senate has non-concurred with the House amendment and has requested a committee of conference

# Third Party Review Consultants

## 2015 SB 98 (Pending)

- RSA 676:4-b, I “Board’s procedures on plats”
  - ❑ Applicant may request a different reviewing consultant, and may suggest a replacement
  - ❑ If such a request is made, planning board has an additional 45 days to take action on the application (65 + 45 = 110 days).
  - ❑ Passed by both Senate and House
  - ❑ Text: “The applicant may request the planning board choose a different third party consultant and the request may include the name of a preferred consultant. The planning board shall exercise reasonable discretion to determine whether the request is warranted. When such a request is granted by the planning board, the 65-day period for the board’s action on an application stated in RSA 676:4, I(c)(1) shall be extended 45 days to provide the board adequate time to identify a different consultant.”

# ZBA Voting

## 2015 SB 141 (Pending)

### ■ RSA 674:33, III

- ❑ Statute presently requires concurring vote of three members to reverse on administrative appeal or to decide in favor of the applicant in any matter
- ❑ Problem faced by applicants when there's only 3 members present – must get unanimity or ask for the hearing to be continued (developer's balance of risk vs. time)
- ❑ Bill would call for a majority vote of a quorum of members
- ❑ Passed by the Senate; *killed* by the House
- ❑ **But** the Senate Public & Municipal Affairs Committee has recommended adding it to HB 486, a bill authorizing the creation of special assessment districts

# Phased Development

## 2015 SB 143 (Pending)

### ■ RSA 674:21

- ❑ Adds a definition for “phased development” to accommodate “large-scale projects”
- ❑ Limitations on building permits for subsequent phases of an approved plan to be based solely on the completion of prior phases
- ❑ To limit building permits otherwise must be done through a growth management ordinance under RSA 674:22 or moratorium under 674:23
- ❑ Passed by both Senate and House



# Accessory Dwelling Units

## 2015 SB 146 (Pending)

- RSA 674:67-68 (new subdivision)
  - ❑ Bill would require municipalities to allow one attached ADU in any single family home – as an accessory use
  - ❑ Cannot limit it to family members; cannot require additional lot size
  - ❑ Cannot require ADU to be smaller than 750 s.f.
  - ❑ Can limit the number of unrelated individuals and can require owner occupancy of ADU or principal unit (without specifying which)
  - ❑ Can require adequacy of water supply and septic disposal
  - ❑ Deemed allowed if local zoning doesn't include ADUs
  - ❑ Local discretion to allow detached ADU; may require added lot size
- ❑ Passed by the Senate; House committee held hearing on 4/21/15
- ❑ Senate Public & Municipal Affairs Committee has recommended adding it to HB 102, a bill dealing with town meeting consideration of warrant articles

# **OEP Statutory and Structural Changes**

## **HB 2 (pending)**

- Removes OEP from several commissions and committees
- Moves State Data Center to NH Employment Security
- Moves Conservation Land Stewardship to Fish & Game
- Eliminates OEP's role in creating the State Development Plan
- Eliminates requirement that OEP maintains files of local master plans and land use ordinances/regulations
- Passed by the House; Senate Finance Committee is instead considering a proposal to establish a legislative study commission to evaluate the role and function of OEP relative to planning



# **PART III**

## **Recent NH Supreme Court Decisions**

- All NH Supreme Court opinions are available on its website – go to [www.nh.gov](http://www.nh.gov), find the Judicial Branch link on the right side, then click on the Supreme Court tab and select “Slip Opinions.”
- You can also get onto the Supreme Court’s email list for notices of decisions.
- Also remember Google Scholar – [scholar.google.com](http://scholar.google.com)

# NHDOT Permits and You!

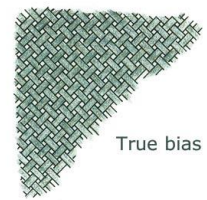


- *S.S. Baker's Realty Co, LLC v. Winchester* (2014)
  - ❑ **3JX Order** – not for citation; no precedential value
  - ❑ Planning board denied a site plan application, citing traffic concerns regarding access to a state highway
  - ❑ But NHDOT had granted a driveway permit; on appeal to court, applicant asserted that the NHDOT permit creates a “presumption that the proposal protects the public interest”
  - ❑ Perhaps, but it wouldn't be binding on the planning board unless the local ordinance had language creating such a presumption
  - ❑ Town zoning said that access to state highways requires conformity with NHDOT driveway permit standards
  - ❑ Supreme Court (affirming the trial court): “This is not the equivalent of stating that the town will deem the traffic impact of a project to be adequately addressed ‘as long as’ the applicant obtains a driveway permit from the State.”
  - ❑ Relied on *Diversified Properties v. Hopkinton* (1984) with a similar holding (that one is good as precedent)

# Decisions Supported by Evidence

- *S.S. Baker's Realty Co, LLC v. Winchester* (2014)
  - **3JX Order** – not for citation; no precedential value
  - RSA 676:4, I(h) requires: “In case of disapproval of any application submitted to the planning board, the ground for such disapproval shall be adequately stated on the records of the planning board”;
  - Also (not cited by court) RSA 676:3 requires a written notice of decision; denials shall include “written reasons for disapproval”
  - Board’s notice cited 3 traffic-related reasons for denial; applicant asserted that the board’s notice of decision was inadequate, and that it was unsupported by evidence
  - Supreme Court (agreeing with the trial court) found sufficient evidence in the minutes to support the board’s decision – abutter testimony, conflicting expert review, peer review comments; these need not be directly cited in the notice of decision or in the board’s deliberations (but it does help!); clearly more than opinion; relied on *Property Portfolio Group v. Derry* (2012)
  - **Practice point:** you can rely on your minutes to “flesh out” your denial notice, but don’t make the judge work too hard...

# Bias and Disqualification



- *S.S. Baker's Realty Co, LLC v. Winchester* (2014)
  - **3JX Order** – not for citation; no precedential value
  - Board comments asserted to demonstrate bias against application, but the issue wasn't raised until trial
  - Supreme Court (agreeing with the trial court): allegations of bias must be raised at the earliest possible time (relying on *Bayson Properties v. Lebanon* (2003))
  - This gives the reviewing tribunal the opportunity to address the issue before it becomes a problem
  - Problems with the analysis:
    - If the applicant calls out a board member for being biased, that may alienate the entire board, not just the member being challenged
    - If there is a reason for disqualification, what action can the board take? RSA 673:14 states that the board may vote on whether the member should be disqualified, but that vote is purely advisory – it's up to the member to decide!
  - **Practice point:** when in doubt, sit it out.

# Floods and Plans



- *Thompson v. Candia* (2014)
  - ❑ **3JX Order** – not for citation; no precedential value
  - ❑ Planning board unanimously denied a 7-lot subdivision of a 42-acre tract, based on concerns about increased flooding
  - ❑ Developer argued that 2011 FEMA demonstrate that flooding was not a threat; town road agent stated that 2005 FEMA map more accurately showed flood potential; abutter testimony (Manchester Water Works) and letter from Police Chief also stated concerns about flooding
  - ❑ Supreme Court: planning board wasn't denying all development, only this particular one
  - ❑ “A planning board’s task, therefore, is not to consider a parcel of land in a vacuum to determine whether it is suitable for subdivision. Rather, a planning board reviews a specific subdivision application and evaluates whether the plan before it meets the municipality’s subdivisions requirements.”
  - ❑ Here: the proposal didn’t meet the requirements



# Estoppel and ZBA Jurisdiction



- *Dembiec v. Town of Holderness* (2014)
  - ❑ Town issued building permit to owner for construction of a single family home. Existing boat house structure contained living quarters on the second floor
  - ❑ Zoning ordinance allowed two dwelling units on a single lot only when they are in the same structure; here, two structures
  - ❑ Construction of the home was substantially complete when the Town's compliance officer informed the owner that he would not issue a certificate of occupancy unless the owner got a variance for the two units in separate structures or all of the plumbing was removed from the boat house
  - ❑ Owners sought equitable waiver from ZBA (RSA 674:33-a); initially granted, but denied after rehearing (intervenors had objected)
  - ❑ Owners then applied for a variance, which was also denied
  - ❑ At the same time, the owners filed an appeal with superior court



KEEP  
CALM  
AND  
ARGUE  
ESTOPPEL

# Estoppel and ZBA Jurisdiction

- *Dembiec v. Town of Holderness* (2014)
  - In trial court appeal, owner claimed that because the town issued a building permit, it was estopped from enforcing the zoning ordinance's provision allowing two dwellings on a lot only in the same structure
  - **Estoppel:** a party may be barred from doing something because of its own conduct previously; it is an equitable remedy to prevent an unjust result; what's fair under the circumstances?
  - Municipal estoppel:
    1. False representation or concealment of material facts made with knowledge of those facts
    2. Party to whom representation is made must be ignorant of the truth
    3. Representation made with intention of inducing the other party
    4. Reliance by other party induced by representation

# Estoppel and ZBA Jurisdiction

- *Dembiec v. Town of Holderness* (2014)
  - Town argued that estoppel was not raised at the local level; asserted that the trial court did not have jurisdiction to hear the case, because administrative remedies at the local level had not been exhausted owner should have sought from the ZBA an administrative appeal of the compliance officer's decision
  - Trial court agreed with the town – to preserve an argument for the court, it has to first be raised at the local level (in most cases...); case dismissed
  - Supreme Court: it's true that in most cases administrative remedies must be exhausted before appealing to court, but some exceptions
    - Some issues are peculiarly suited to judicial remedy (such as questions of constitutionality of a law); or
    - Where pursuit of lower administrative remedies would be futile
      - For example: where the lower tribunal doesn't have the authority to grant the relief sought

# Estoppel and ZBA Jurisdiction



- *Dembiec v. Town of Holderness* (2014)
  - Here, ZBA doesn't have authority to grant relief
    - Although some prior cases have silently affirmed the ZBA's review of municipal estoppel, the question of its authority to do so has never been raised before
  - Court reviewed the powers of the ZBA: administrative appeals where error is alleged in administrative official's zoning interpretation; variances; special exceptions; equitable waivers
  - Equitable considerations may come into play when the ZBA exercises its powers in these, but there's no statement of statutory authority for the ZBA to grant relief under the equitable doctrine of municipal estoppel

# Estoppel and ZBA Jurisdiction

- *Dembiec v. Town of Holderness* (2014)
  - Variance and equitable waiver requirements couldn't have been met; no allegation of error by the compliance officer – therefore, administrative appeal was inappropriate; what recourse did the owner have here, but to go to court?
  - Reversed and remanded for further proceedings
  - **Practice Point:** local boards only have the authority that statutes clearly confer upon them; estoppel is a question for the court
  - What will happen next? Trial court will need to determine whether the town is estopped from enforcing its ordinance.
  - Compare with *Thomas v. Town of Hooksett* (2006)

# Impact Fees and Exactions

- *A Quick Primer on Impact Fees* (RSA 674:21, V)
  - ❑ Municipalities may adopt ordinances allowing the planning board to assess impact fees on development, requiring development to pay its “fair share” of the cost of improvements to municipal capital facilities and infrastructure (see statute for list of types)
  - ❑ “The amount of any such fee shall be a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development...”
  - ❑ Constitutional tests: proportionality and rational nexus; failing either of these tests, an impact fee would be deemed an unconstitutional taking of private property
  - ❑ U.S. Constitution, Amendment V “...nor shall private property be taken for public use without just compensation.”
  - ❑ Impact fee ordinances require
    - (1) municipal capital improvements program;
    - (2) careful study demonstrating the basis for the fees;
    - (3) careful monitoring to ensure that the fees are used for their intended purposes; or else, they must be refunded with interest

# Impact Fees and Exactions

- *A Quick Primer on Exactions* (RSA 674:21, V(j))
  - Compare the impact fee statute with the “exactions” statute:
  - RSA 674:21, V(j) *ad hoc* exactions by planning boards are allowed for off-site improvements in the absence of an impact fee ordinance, but are limited to (1) highways, (2) drainage, (3) sewer, and (4) water improvements
  - The same legal tests as for impact fees: improvements necessitated by the development, or rational nexus; proportional share of the municipal costs
  - Exactions assessed at the time of approval
  - Why was this statute necessary? Couldn't planning boards impose exactions on a case-by-case basis without impact fees?
    - Simonsen v. Derry (2000)

# Impact Fee Refunds

- *K.L.N. Construction Co, Inc. v. Town of Pelham (2014)*
  - Town adopted impact fee ordinance in 1999 partly for a new fire station
  - Fees collected from developers were used between 2002 and 2010 on feasibility studies, architectural drawings, and construction estimates
  - Several bond votes failed, but town voters approved construction in 2012, after which several developers sued for refund of fees
  - Who gets to ask for a refund?
  - Let's take a look at the statute



# Impact Fee Refunds

- *K.L.N. Construction Co, Inc. v. Town of Pelham (2014)*
  - RSA 674:21, V(e) “The ordinance shall establish reasonable times after which any portion of an impact fee which has not become encumbered or otherwise legally bound to be spent for the purpose for which it was collected shall be refunded, with any accrued interest. Whenever the calculation of an impact fee has been predicated upon some portion of capital improvement costs being borne by the municipality, a refund shall be made upon the failure of the legislative body to appropriate the municipality's share of the capital improvement costs within a reasonable time. The maximum time which shall be considered reasonable hereunder shall be 6 years.”
  - **Refunded to whom?** This question has been the source of spirited debate among planners for many years
  - **What's fair?** Refund to the original payor, or the current owner?

# Impact Fee Refunds

- *K.L.N. Construction Co, Inc. v. Town of Pelham (2014)*
  - Pelham's zoning ordinance states that "current owners of property on which impact fees have been paid may apply for a full or partial refund of such fees, together with any accrued interest."
  - The developers no longer owned the properties against which the impact fees were levied
  - Developers challenge the town's ordinance, claiming that the use of impact fees for "pre-construction activity" violated the statute and that the fees hadn't been used within the statutory 6-year period
  - Town moves to dismiss, claiming that the petitioners lacked standing because they no longer owned the properties
  - Petitioners claim that the town could only make refund to the original payor – but the statute doesn't define "refund"
  - Trial court agrees with the Town, and dismissed the case
  - Appeal to Supreme Court

# Impact Fee Refunds

- *K.L.N. Construction Co, Inc. v. Town of Pelham (2014)*
  - ❑ Whether developers have standing depends on the definition of “refund”
  - ❑ Court looks to dictionaries and to other jurisdictions’ practices regarding returns of impact fees – no bright line anywhere
  - ❑ Court looks at the broader statutory context – how else is “refund” used?
  - ❑ Exactions, RSA 674:21, V(j) “Whenever the calculation of an exaction for an off-site improvement has been predicated upon some portion of the cost of that improvement being borne by the municipality, a refund of any collected exaction shall be made to the payor or payor's successor in interest upon the failure of the local legislative body to appropriate the municipality's share of that cost within 6 years from the date of collection.”
  - ❑ The impact fee statute was originally adopted in 1991; the exaction subsection of it was adopted in 2004; what does “payor’s successor in interest” mean?

# Impact Fee Refunds

- *K.L.N. Construction Co, Inc. v. Town of Pelham (2014)*
  - The impact fee statute was originally adopted in 1991; the exaction subsection of it was adopted in 2004; what does “payor’s successor in interest” mean?
  - Court assumes that it means the business successor, which would constrain how exactions could be refunded (but could it mean something else? Court sees no ambiguity, so doesn’t check legislative history)
  - The absence of similar language in the impact fee statute suggests broader scope of authority for municipalities to decide to whom refunds of impact fees may be made
  - Therefore, Pelham’s ordinance allowing “refund” to the current owner is OK
  - Therefore, the original developers who no longer own the properties can’t challenge the ordinance because they have no standing to do so

# Impact Fee Refunds

- *K.L.N. Construction Co, Inc. v. Town of Pelham* (2014)
  - ❑ “...payor’s successor in interest” was intended to mean “current owner”! (How do we know what was intended?)
  - ❑ But the author of the clause didn’t use clear, unambiguous language, so the Court got tripped up without ever knowing it
  - ❑ Irony: that author’s mistake helped the Court uphold Pelham’s ordinance
  - ❑ Affirmed; case dismissed
  - ❑ **Practice Point**: Horton the Elephant – “Say what you mean and mean what you say.” When drafting laws be clear, not cute
  - ❑ What remains imperfectly answered is who gets the refund if the municipal impact fee ordinance is silent on the question.

# Londonderry and Impact Fees

- ❑ Robust impact fee ordinance adopted in 1994 – highways and recreation
- ❑ Fees collected were used, in part, for town's share of improvements to state highways (statute clearly only allows for collection of impact fees relative to infrastructure owned by the municipality)
- ❑ Sued in 2012 by Shell Oil; many other parties piled on
- ❑ Londonderry abandoned its impact fee ordinance and promised to refund \$1.2 million; and the issue in court became who gets what?
- ❑ Ordinance calls for refund to current owners; court questioned this in a 12/31/12 order, but that was subsequently addressed in *K.L.N. Construction*

# Londonderry and Impact Fees

- ❑ Trial court: “Because the facts alleged by Mesiti and by multiple defendants indicates that the Town has been, at best, lackadaisical in their handling and documentation of impact fees, the Court cannot rely upon the Town’s representations as to payment amounts, dates, and the purpose for which impact fees were used. Therefore, the Court sees a full accounting of the impact fee program to be the only solution to the Town’s widespread misfeasance.
- ❑ Orders an independent audit
- ❑ Audit reveals very poor record keeping
- ❑ Ongoing litigation, but poor records and the passage of time present problems for claimants
- ❑ Questions now before the Supreme Court on the claims of the Town’s negligence (dismissed by trial court)
- ❑ **Practice point:** impact fees are complex to assess and administer, even with professional staff; look before you leap!



QUESTIONS